

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

May 26, 2011

In the Matter of CASSIDY, Minors.

No. 300894

Emmet Circuit Court

Family Division

LC No. 08-005723-NA

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor twins under MCL 712A.19b(3)(c)(i), (g), and (j). We reverse and remand.

In March 2008, when the minor children in this case, who are twins, were six months old, their mother filed a paternity complaint against respondent. Respondent evaded personal service, and only answered the complaint after the trial court ordered alternate service. Respondent denied paternity and requested genetic testing. The testing established respondent as the father of the twins. An order of filiation and support was entered by default in September 2008.

The twins, along with an older half-sister, were removed from their mother's care in December 2008, and were eventually placed with a cousin of the mother. Respondent attended the preliminary hearing, where the DHS worker indicated that respondent, even though he had not had any contact with the twins, wanted a relationship with them. The trial court granted petitioner discretion in allowing supervised or unsupervised visits. Thereafter, the foster care worker attempted to contact respondent to discuss a case service plan and to arrange visits, but respondent generally failed to respond to the telephone messages.

Respondent first visited with the twins in March 2009. His first visits with the twins were supervised by the foster care worker, but were then supervised by a parent aide. The parent aide supervised one visit a week. Respondent cancelled or no-showed for several of the visits, but those visits were often made up with other approved supervisors. Respondent's girlfriend and the twins' foster care mother were approved supervisors, and the foster care mother testified that she supervised weekly visits between respondent and the twins. Respondent participated in a case service plan. In addition to supervised visits, respondent received a psychological evaluation, counseling, parenting assistance, and drug screens.

In September 2009, respondent was sentenced to two to five years' imprisonment for third-degree fleeing and eluding for an incident that occurred in April 2009. Respondent's earliest release date is September 2011.

At the November 2009 permanency planning hearing, the foster care worker testified that she intended to "maintain status quo" with respondent; there were no plans to terminate respondent's parental rights. The foster care worker planned to monitor any services that respondent could possibly participate in while incarcerated.

In March 2010, petitioner filed a supplemental petition to terminate respondent's parental rights.¹ At the termination hearing, the foster care worker testified that she sought termination of respondent's parental rights because of the period of his incarceration and the age of the twins. She testified that if respondent's parental rights remained intact, respondent, when released from prison, would need to begin with supervised visitation and reengage in services that had previously been provided to him. She opined that it could possibly be two years after the termination hearing before permanency could be established between respondent and the twins. The foster care worker admitted that before respondent was incarcerated, he was doing well with the services that were provided to him and that his parenting time with the twins was going very well. Following the hearing, the trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j).

On appeal, respondent argues that the trial court erred in finding clear and convincing evidence to support termination of his parental rights. He also argues that the trial court erred in finding that he had been afforded due process as required by *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

To terminate parental rights, a trial court must find that one of the statutory grounds for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Jenks*, 281 Mich App 514, 516; 760 NW2d 297 (2008). Once a ground for termination is established, the trial court must terminate parental rights if its finds that termination is in the child's best interests. MCL 712A.19b(5).² This Court reviews for clear error the trial court's decision that a statutory ground for termination has been proven by clear and convincing evidence and its decision on the child's best interests. MCL 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A decision is clearly erroneous "if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich at 209-210.

¹ The twins' half-sister was returned to the mother's care in January 2010, but was removed in February 2010.

² In addition, because the twins were Indian children, the trial court could not terminate respondent's parental rights absent "a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f).

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which provide:

The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Initially, we conclude that the trial court clearly erred in finding that the ground for termination under MCL 712A.19b(3)(j) was established by clear and convincing evidence. According to the trial court, there was a reasonable likelihood that the twins would be harmed if returned to respondent because the twins had "bonded" with their foster parents and they needed "permanency and certainty." The trial court stated they could not remain in "legal limbo" while respondent awaited release from incarceration, established suitability as a parent, and provided a safe and appropriate home. However, devoid from the trial court's opinion was any finding that based on respondent's "conduct or capacity," there is a reasonable likelihood that the twins will be harmed, either through abuse or neglect, if placed in respondent's home. In addition, although respondent was in prison and has a criminal record, "a criminal history alone does not justify termination." *In re Mason*, 486 Mich at 165. No evidence was presented that respondent had ever harmed a child, and no evaluation was ever conducted to determine the likelihood of respondent committing another criminal offense. For these reasons, we conclude that the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(j).

We also conclude that the trial court clearly erred in finding that the grounds for termination under MCL 712A.19b(3)(c)(i) and (g) were established by clear and convincing

evidence. The trial court provided the following explanation for terminating respondent's parental rights under §§ (3)(c)(i) and (3)(g):

[Respondent], at the time the case began, was unavailable to care for his children, having made the decision to avoid legal parentage. Similarly, at the present time [respondent] is again unavailable to care for his children due to his new felonious conduct which has resulted in his incarceration.

In *In re Mason*, 486 Mich at 160, the Supreme Court held that “[t]he mere present inability to personally care for one’s children as a result of incarceration does not constitute grounds for termination.”³ Here, based on its explanation, the trial court terminated respondent’s parental rights under §§ (3)(c)(i) and (3)(g) because, due to his incarceration, respondent was unable to presently care for the twins. Such action contravenes *In re Mason*.

Further examination of the Supreme Court’s opinion in *In re Mason* confirms a conclusion that the trial court’s decision to terminate respondent’s parental rights under §§ (3)(c)(i) and (3)(g) was clearly erroneous. Regarding the grounds for termination set forth in these two sections, the Supreme Court stated “each of these grounds requires clear and convincing proof that the parent has not provided proper care and custody and will not be able to provide proper care and custody within a reasonable time.” *In re Mason*, 486 Mich at 164-165. It further stated that the grounds for termination under §§ (3)(c)(i) and (3)(g) are “factually repetitive and wholly encompassed by MCL 712A.12b(3)(h).” *Id.* at 165. Thus, we look to the Supreme Court’s statements concerning § (3)(h) for an explanation of the requirements for termination under §§ (3)(c)(i) and (3)(g). In discussing § (3)(h), the Supreme Court explained that the requirement that a parent has not provided proper care and custody “permits a parent to provide for a child’s care and custody *although the parent is in prison*; he need not *personally* care for the child.” *Id.* at 161 (emphasis in original). In addition, it clarified that the requirement that a parent will not be able to provide proper care and custody “is forward-looking; it asks whether a parent ‘will be able to’ provide proper care and custody within a reasonable time. Thus, a parent’s past failure to provide care because of his incarceration also is not decisive.” *Id.*

Pursuant to *In re Mason*, in determining whether termination of an incarcerated parent’s parental rights is proper, a trial court must consider three factors. First, the trial court must consider when the respondent anticipates being released from incarceration. *Id.* at 162. Second, the trial court must consider whether the respondent had the opportunity to meaningfully participate in the case service plan. *Id.* at 162-163. Only when a respondent has the opportunity for meaningful participation can a trial court adequately assess whether the respondent can

³ We note that, contrary to respondent’s statement of question presented, *In re Mason* was not decided on due process grounds. It was decided on the violation of various statutes and court rules. See *In re Mason*, 486 Mich at 166 (“We do not reach the question whether reversal could be independently required under a due process analysis. Rather . . . under the circumstances of this case it is enough that the court violated several statutes and court rules.”).

provide proper care for his children within a reasonable time in the future. *Id.* at 159-160, 163.⁴ Third, the trial court must consider whether the respondent can fulfill his duty to provide proper care and custody by voluntarily granting legal custody to relatives for the remainder of the incarceration term. *Id.* at 163.

In its opinion, the trial court noted that respondent's earliest release date was September 2011, but it stated, in the same sentence, that respondent could be incarcerated for his full five-year sentence. The trial court did not consider how soon it would take respondent to be ready to care for the twins if respondent was released from incarceration in September 2011. The foster care worker testified that if respondent was released in September 2011, it could take two years from the termination hearing before permanency could be established between respondent and the twins.⁵ She explained that respondent would need to begin with supervised visitation and reengage in services previously provided. However, a conclusion, based on the foster care worker's testimony, that respondent could not reasonably care for the twins within a reasonable time in the future would be improperly rooted in missing information directly attributable to respondent's lack of meaningful participation after he was incarcerated. *Id.* at 162. There is no evidence that after respondent was incarcerated the trial court or petitioner ever facilitated respondent's continued access to services or discussed updating the case service plan. See *id.* at 157. Indeed, all references to respondent after he was incarcerated at hearings and in the updated case service plans and court reports submitted by the foster care worker were generally limited to the fact that respondent was incarcerated. Specifically, in the foster care worker's October 2009 court report, the only recommendation for respondent was that he participate in random drug screens, and the January 2010 report contained no recommendations for respondent. Further, the foster care worker testified at the termination hearing that after the twins' mother stopped complying, the permanency plan would have been reunification with respondent had he not been in prison. Thus, it appears that after respondent was incarcerated, petitioner and the trial court focused solely on the twins' mother.

The trial court also did not consider whether respondent could fulfill his duty to provide proper care and custody to the twins by voluntarily granting legal custody of them to relatives for the remainder of his term of incarceration. Here, the twins were placed with relatives; their foster mother was their mother's cousin.⁶ Respondent testified that he had a good relationship with the foster mother, was happy with the placement, and saw no reason to request a change in the twins' placement, either before or after he was incarcerated. He believed the twins were being well cared for. Thus, there was no reason for respondent to make different arrangements

⁴ The trial court must also ensure that an incarcerated parent was given the right to participate in the proceedings by telephone. *In re Mason*, 486 Mich at 152-155. Respondent does not dispute that, after he was incarcerated, he was afforded the right to participate in the child protective proceedings by telephone.

⁵ Two years from the date of the foster care worker's testimony was June 2012, 9 months after respondent's earliest release date.

⁶ It was also discovered that respondent was related to the twins' foster father.

for the twins after he was incarcerated. Although the trial court recognized that the twins had bonded with their foster parents, it failed to recognize that the twins were placed with relatives. It also failed to recognize that respondent's girlfriend had established a relationship with the foster mother, and that when respondent's girlfriend spent time with the twins, she arranged telephone calls with respondent, where respondent was able to speak with the twins. For the above reasons, we conclude that the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(c)(i) and (g).⁷

We reverse the order terminating respondent's parental rights and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

⁷ Because we conclude that the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), we need not address respondent's remaining arguments that the trial court erred in its best interests determination or in its finding that continued custody of the twins by respondent was likely to result in serious emotional or physical damage to the twins.